No. 85-1606

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WHALERS' VILLAGE CLUB,

Appellant,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Supreme Court of California

MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The California Coastal Commission, appellee herein, respectfully moves this Honorable Court to dismiss the appeal now pending or, in the alternative, to affirm the decision of the California Court of Appeal, Second Appellate District, Division Six on the following grounds:

A. The questions on which the decision of the cause depends are insubstantial and do not require further argument. These same issues have previously been presented to this court in the recent cases of *Remmenga v. California Coastal Commission* (1985) __ U.S. __ [106 S.Ct. 241, 88 L.Ed.2d 250] and *Associated Home Builders of the Greater East Bay Inc. v. City of Walnut Creek, et al.* (1971) 404 U.S. 878. In each case, the appeal was dismissed for want of a substantial federal question.

B. This appeal is improvidently brought because the decision of the Court of Appeal did not involve the validity of a state statute. Rather, it involved the application of the California Coastal Act by appellee California Coastal Commission in a particular factual context. Moreover, appellant has not stated grounds for review by this Court under certiorari.

STATEMENT OF THE CASE

This appeal attacks the ability of the California Coastal Commission to regulate new coastal development. Specifically, it attacks the ability of the California Coastal Commission to protect publicly-owned tidelands and the people's right of access to those lands, guaranteed by the state constitution, from the erosive effects of newly constructed seawalls. The beaches of California are a finite resource whose gradual erosion may be hastened by the construction of seawalls and the impacts of those seawalls on shoreline processes. At stake here is the ability of the California Coastal Commission to balance public rights in tidelands and access to them with the need of coastal property owners to protect their private property by requiring dedication of public access in exchange for permit approval to construct seawall revetments. Traditional land use law has long recognized the power of government to condition its approval of development upon dedication requirements to lessen or avoid potential impacts on public resources. This case is no different.

Under article X, section 4 of the California Constitution,[1] no upland owner may interfere with the public's right of access to the sea. Further, the State Legislature is obligated to enact all laws necessary to make public access always attainable. Pursuant to this mandate and in light of the growing public awareness of the deleterious impacts of development on the coast, the California Legislature enacted the Coastal Act of 1976.[2] One of the express goals of the Legislature's enactment is to maximize public access to and along the coast. (Pub. Resources Code, § 30001.5(c).) Section 30212 of the Coastal Act provides in pertinent part:

> "(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway."

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[1] "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

[2] In 1972, the people of California adopted the Coastal Initiative which found and declared that the coastal zone is a distinct and valuable resource belonging to all the people, that it exists as a delicately balanced ecosystem and that the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern to present and future residents of the state and nation. (*CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 321.) The 1976 Act is the legislative continuation of that Coastal Initiative.

It is within this context that the dedication condition at issue here was required.

The facts of this case are accurately set forth in the California Court of Appeal decision attached as Appendix A to appellant's Jurisdictional Statement. Briefly, appellant Whalers' Village Club ("Whalers' Village") consists of 29 single-family homes built in 1969. In 1978, massive storms threatened the complex. The homeowners were informed by their consultants that a seawall revetment constructed seaward of the beachfront homes would protect them. (Juris. State., App. A, p. 2.) Whalers' Village sought permission from appellee's predecessor, the Regional Commission, to construct such a seawall revetment. (*Ibid.*) When Regional Commission staff recommended permit approval subject to a public access condition pursuant to the Coastal Act, the homeowners withdrew their permit application. (*Id.* at p. 3.)

In 1980, additional storms threatened the beachfront units. Without applying for a permit, Whalers' Village constructed a massive seawall revetment on the beach in front of the entire complex, consisting of 5-7 ton boulders with 50-150 pound boulders and gravel fill extending 3-5 feet above the beach level and 6-8 feet into the sand. (*Ibid.*) It was not until after the revetment was fully in place that Whalers' Village sought the required coastal development permit from appellee Commission. (*Ibid.*)[1] The Commission approved a permit for the seawall revetment subject to the condition that Whalers' Village offer to dedicate an easement for public lateral access and passive recreational use. (*Ibid.*)

Whalers' Village challenged the Commission's imposition of the beach access and use condition as a "taking" without just

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[1] Whalers' Village insinuates it could not have applied for and accepted an emergency or regular permit and subsequently challenge any condition it found offensive. Whalers' Village ignores California case law recognizing an ability to subsequently challenge conditions where acceptance of the permit occurs under exigent circumstances. (*McLain Western #1 v. County of San Diego* (1983) 146 Cal.App.3d 772, 775-776.)

compensation prohibited by the Fifth Amendment to the United States Constitution. The California Court of Appeal rejected appellant's contention. The Court held that "as a general proposition, the Commission may constitutionally require uncompensated access dedication as a condition of approving coastal development." (*Id.* at p. 13.) Specifically, the court held:

> ". . . the condition of offering to dedicate an easement for public access was reasonably related to one of the principal objectives of the Coastal Act, which is to provide for maximum access to the coast by all the people in this State (§ 30001.5, subd. (c)) and was supported by the evidence in the record. Its relationship to the 'nature and impact' of the proposed project was not a valid basis for the trial court's determination that the access condition deprived Whalers' Village of its constitutional rights. (*Georgia-Pacific Corp. v. California Coastal Com., supra*, 132 Cal.App.3d 678, 699.) Moreover, the burden of this condition may be minimal. If, as respondent argues, there is no need for public access at that particular location because it leads to another private beach, it is likely no public agency or private association will accept the offer to dedicate the public easement with its attendant liabilities and maintenance. (See *Grupe v. California Coastal Com., supra*, 166 Cal.App.3d 148, 184.)" (Juris. State., App. A, pp. 20-21; fn. omitted.)[4]

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[4] The public access easement need not be opened to public use until a public agency or private association accepts responsibility for maintenance and liability. (Pub. Resources Code, § 30212(a).)

I

THE ISSUES PRESENTED BY THIS APPEAL ARE SO BASIC TO LONG-ESTABLISHED LAW ON LAND USE REGULATION AS TO REQUIRE NO FURTHER ARGUMENT

Appellant's attack in this case is on principles of constitutional law uniformly applied in California for more than 35 years with which this court has concurred either by express holdings or through dismissal of prior appeals. This appeal presents issues so basic to long-established law on land use regulation that no further argument is required.

In *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek et al., supra*, 404 U.S. 878, this court concurred with a California Supreme Court decision upholding the constitutionality of dedication requirements as a condition to approval of new development. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633.) The validity of such dedication requirements is not dependent upon a factual showing that the development has created the need for it.

Similarly, this Court recently rejected an appeal, for lack of a substantial federal question, in a case challenging appellee Comission's ability to require fees in lieu of actual dedications for provision of public access. (*Remmenga v. California Coastal Com., supra*, 88 L.Ed.2d 250.) In that case, the California Court of Appeal had upheld imposition of fees, in lieu of provision of dedicated public access, against a constitutional challenge identical to that proferred by appellant here.

Appellant's argument that the Commission cannot require an offer of dedication as a condition to approval of new development merits no further consideration by this court.

A. Appellant Misrepresents This Court's Prior Decisions

Appellant asserts that recent decisions of this court establish the Commission's beach access and use condition constitutes a "taking" without just compensation. The cases relied upon by appellant are simply not applicable to the facts of this case.

Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419 involved a situation where the property owner took no action which could trigger the police power of the State of New York. New York enacted a statute permitting Teleprompter, a cable television company, to install television cables on apartment buildings without paying the owners of the buildings. This court found this physical intrusion without any action of the property owner was improper unless payment was made. The case does not involve a permit situation like the present one where the property owner seeks governmental authorization to effect a change in his property and, in approving this change, the government attaches conditions to its approval.

In *Kaiser Aetna v. United States* (1979) 444 U.S. 164, the property owners had obtained prior approval from the Army Corps of Engineers to dredge and develop a marina. Once the marina was finished, the Corps then sought to require it be opened to the public.[5]

The court held that to do so would require compensation, stating:

> "We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have

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[5] Appellant's recitation of the facts in *Kaiser Aetna* is misleading. (Juris. State., pp. 11-12, 15-16.) A careful reading of this court's discussion of the facts of the case dispells any similarity to the facts presented here. (*Kaiser Aetna v. United States, supra*, 444 U.S. 166-169.)

> impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot 'estop' the United States [citations], it can lead to the fruition of a number of expectancies embodied in the concept of 'property' -- expectances that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. . . ." (*Id.* at p. 179.)

Unlike *Kaiser Aetna*, Whalers' Village here cannot claim that the prior consent of the Commission has somehow given rise to any expectancy.[6] On the contrary, Whalers' Village admitted that it undertook its construction with the full knowledge that a permit was required and that a condition requiring an offer to dedicate an easement for public access would likely be imposed, as required by the Coastal Act of 1976. (Pub. Resources Code, § 30000 et seq.) Appellant's reliance on *Kaiser Aetna* and *Loretto* to support it's claim of a "taking" is misplaced.

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[6] As noted by the Court of Appeal, "[t]he original building permits for construction of residences did not give . . . [Whalers' Village] a preexisting right to unregulated new construction. . . ." (Juris. State., App. A, p. 9.) "[I]t was the homeowners' action which triggered the police power to regulate what they were constructing and there was no prior governmental approval on which they relied. . . ." (*Id.* at p. 15.)

B. The Opinion of the Court Below Comports With This Court's Decisions Analyzing Whether Governmental Regulation Amounts to a Taking

The Court of Appeal found that the beach access and use condition was reasonably related to one of the principal objectives of the Coastal Act, that of providing for maximum access to the coast by all the people in California, and that the condition did not deprive the homeowners of all reasonable use of their property and therefore all economic use. (Juris. State., App. A, pp. 15, 20.) This analysis clearly comports with this court's test for determining whether a taking has occurred. As this court stated in *Agins v. Tiburon* (1980) 447 U.S. 255, 260:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928) or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36 (1978)."

Thus, contrary to appellant's claim, the standard employed by the Court of Appeal to analyze the validity of the condition imposed was not in conflict with this court's pronouncements. Appellant's characterization of the so-called "rational relationship rule" is misleading. (Juris. State., pp. 17-19.)

Appellant's reliance on the Ninth Circuit decision in *Sederquist v. City of Tiburon* (9th Cir. 1984) 765 F.2d 756 is equally inappropriate. There the city imposed conditions on development of vacant land which the landowners could not satisfy, essentially requiring "joint action" by property owners. Absent satisfaction of those conditions, the property owners were denied all economic use of their property. Here, the homeowners in Whalers' Village have not been deprived of economic use of their property. They

have not been denied a permit for the new construction nor prevented from continuing the residential use of their property.

In essence, appellant's arguments amount to an assertion that government can never require dedications in exchange for development approval. This simply ignores reality. Carried to its logical conclusion, appellant's argument would preclude street dedications, sidewalk and bicycle path dedications, park and open space dedications, school fee requirements, parking requirements and all similar means utilized to offset the impacts, individual and cumulative, which development places on public welfare and resources. Such an argument is so explicitly foreclosed by prior decisions of this court as to warrant no further consideration.

II

APPELLANT HAS NOT BEEN DENIED THE RIGHT TO DETERMINE WHETHER CONSTITUTIONAL RIGHTS HAVE BEEN ABRIDGED

Appellant's argument that it has been deprived the right to a determination of whether its constitutional rights have been abridged is specious. (Juris. State., pp. 19-22.) The Court of Appeal decision itself deals extensively with appellant's claims. Obviously appellant was not denied the opportunity to litigate whether its constitutional rights were abridged. Appellant did attempt to raise its "taking" claim by cross-complaint in a collateral attack on the Commission's decision which the trial court ruled was improper, granting summary judgment to the Commission on that ground. That ruling, however, did not affect appellant's right to raise the constitutional issues in its direct attack on the Commission's decision.

III

APPEAL TO THIS COURT IS IMPROPER

Appellant invokes the jurisdiction of this court based on 28 United States Code section 1257(2). That section allows an appeal where the validity of a state statute is drawn into question on the grounds that it is repugnant to the United States Constitution. Here, however, it is the permit decision of the California Coastal Commission, based on the factual circumstances before it, which is challenged. The Court of Appeal decision did not address the validity of a state statute; rather, it upheld the Commission's administrative decision against constitutional attack. (Juris. State., App. A, pp. 1-2.) Further, appellant did not seek review by the Supreme Court of California of the validity of a state statute. Review of the conditions attached to the Commission's permit decision only was sought. While appellant had challenged the constitutional validity of specific provisions of the Coastal Act in its First Amended Petition for Writ of Mandate, that challenge was never the basis for the decision of the state appellate court. Thus, the appeal should either be dismissed as improvidently brought or, if treated as a petition for review by writ of certiorari, review should be denied on the grounds set forth above.

CONCLUSION

The constitutional issues raised by appellant need no further review by this Court. The decision of the State Court of Appeal is entirely consistent with prior decisions of this court and with accepted land use law as it has evolved over the past century. The Court of Appeal decision should be affirmed or, alternatively, the appeal should be dismissed.

DATED: April 21, 1986

Respectfully submitted,

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No: 85-1606
October Term, 1985

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I, THE UNDERSIGNED, say: I am a citizen of the United States, 18 years of age or over, employed in the County of San Diego in which county the below stated mailing occurred, and not a party to the subject cause. My business address is 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 21st day of April 1986.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, April 21, 1986.

Jamee Jordan Patterson
JAMEE JORDAN PATTERSON

Subscribed and sworn to before me
this 21st day of April, 1986.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986